MICHIGAN LAW REVIEW

PUBLISHED MONTHLY DURING THE ACADEMIC YEAR, EXCLUSIVE OF OCTOBER, BY THE

LAW FACULTY OF THE UNIVERSITY OF MICHIGAN

SUBSCRIPTION PRICE, $2.50 PER YEAR. 35 CENTS PER NUMBER

NOTE AND COMMENT

IS A DIVORCE GRANTED WHERE ONE ONLY OF THE PARTIES IS DOMICILED ENTITLED TO FULL FAITH AND CREDIT?—The case of *Haddock* v. *Haddock*, just decided (Apr. 16, 1906) by the Supreme Court of the United States, is one of very general interest and of great importance. The parties were married in New York and immediately separated, the wife remaining in New York, and the husband going to Connecticut where he acquired a *bona fide* domicil. Some thirteen years afterwards he secured a divorce from his wife for desertion, notice to her being by publication, in full compliance with the laws of Connecticut. Eighteen years later Mrs. Haddock sued her husband in New York and there obtained personal service upon him. He answered setting up, among other things, the Connecticut decree. The New York court refused to admit the judgment roll in the Connecticut proceedings, denying that that court had jurisdiction of the wife because notice was by publication and she had not appeared; the court decreed separation from bed and board and alimony, and this judgment was sustained by the Court of Appeals of New York.

"The Federal question is, Did the Court below violate the Constitution of the United States by refusing to give the decree of divorce rendered in the State of Connecticut the faith and credit to which it was entitled?" The opinion of the court which gives a negative answer is by MR. JUSTICE WHITE, while MR. JUSTICE BROWN and MR. JUSTICE HOLMES write dissenting opinions, each concurring in the opinion of the other, and MR. JUSTICE HARLAN and MR. JUSTICE BREWER concur in both these dissenting opinions.

The opinion in part lays down the following propositions as established by the previous adjudications of the court:

First. The requirement of the Constitution is not that some, but that full faith and credit shall be given by States to the judicial decrees of other States. * * *

Second. Where a personal judgment has been rendered in the courts of a State against a non-resident merely upon constructive service * * * such judgment may not be enforced in another State in virtue of the full faith and credit clause. * * *

Third. The principles, however, stated in the previous proposition are controlling only as to judgments *in personam* and do not relate to proceedings *in rem*. * * *

Fourth. The general rule stated in the second proposition is, moreover, limited by the inherent power which all governments must possess over the marriage relation, its formation and dissolution as regards their own citizens. * * *

Fifth. That a State where both are domiciled has jurisdiction to grant a divorce entitled to recognition in every other State by virtue of the full faith and credit clause, and this is true if one is there domiciled and the other appears.

Sixth. The domicil of matrimony is not changed to the new domicil of the husband when he abandons his wife, but the matrimonial domicil continues to be the wife's domicil till she acquires a new one.

Seventh. Where the domicil of the husband and the matrimonial domicil concur the unjustifiable absence of the wife therefrom may be disregarded, and the court of such domicil may grant the husband a divorce which is entitled to full faith and credit in the other States though notice to the wife is constructive only.

From this it follows: a. That no question of the right of Connecticut to give effect within its borders to this decree can arise. b. That from the sixth proposition the wife's domicil is New York. c. That as the wife was neither actually nor constructively domiciled in Connecticut, did not appear in the divorce proceedings and was only constructively served, the court of Connecticut had no jurisdiction of the wife under the fifth and seventh propositions.

Did then the domicil of the husband alone confer jurisdiction to render a decree against the wife which is entitled to full faith and credit in other States? Or would this be to enforce in one State a personal judgment rendered in another State which had no jurisdiction of the defendant?

It is elementary that no judgment is entitled to full faith and credit unless

rendered by a court having jurisdiction. As each State has power to determine the *status* of its citizens the domicil of one could not confer jurisdiction to render a decree entitled to full faith and credit, for thereby the non-domiciled party would have his *status* determined in the State of his domicil and the power of the latter would thus be rendered nugatory.

(From the foregoing summary the reader will readily see that the conclusion of the court rests upon the second of the preceding propositions as limited by the fourth.)

MR. JUSTICE BROWN refutes this statement by showing that the logical result of this would be that no State could fix the marital *status* even of its own domiciled citizen without acquiring jurisdiction of the person of the defendant. The opinion of the court also says that to give full faith and credit to a divorce granted upon constructive service upon the defendant by a court where only one party was domiciled would place all of the other States under the power of the State having the most liberal divorce laws.

Conceding this to be true and also conceding that the Federal government has no authority over the subject of marriage and divorce, it scarcely follows that these facts are very persuasive that the full faith and credit clause does not apply.

The principal point in controversy between the prevailing opinion and dissenting opinions is whether a divorce proceeding is one *in personam* or *in rem,* the majority regarding it as of the former kind and the minority considering it *in rem.*

If the proceeding, so far as it affects the *status,* be considered to be *in personam* the conclusion necessarily follows that the defendant who is not served within the jurisdiction, who does not appear and who is neither actually nor constructively within the jurisdiction cannot be affected no matter what steps may have been taken to bring him in. However, if the proceeding be one *in rem* the domicil of one party, constructive service upon the other and jurisdiction over the *res* will be enough, though here arises another difficulty. What is the *res?* Where is it? The view most commonly accepted is that the *res* is the marital relation or *status.* It would seem necessarily to follow that it is present *in its entirety* wherever either has a legal and *bona fide* domicil, so that the court of either domicil has jurisdiction to render a decree entitled to recognition in every other State, so far as the *status* and any property rights depending thereon are concerned. This conclusion seems to be a necessary corollary from the decisions in the State courts which, in the language of MR. JUSTICE BROWN, "Overwhelmingly preponderate in holding" that the court of the *bona fide* domicil of one party may grant a divorce "calling in the non-resident defendant by publication."

Even courts considering the proceeding to be one *in personam* must, I believe, recognize that a *res* is involved over which the court must have jurisdiction, for it is not believed that any court would recognize as valid a decree secured when both parties had submitted themselves to a jurisdiction where neither was domiciled, *Andrews* v. *Andrews,* 188 U. S. 14, at least if the question was so raised as to exclude the element of estoppel. *In re Ellis's Estate,* 55 Minn. 401; *Waldo* v. *Waldo,* 52 Mich. 94; *Kinnier* v. *Kinnier,* 45

N. Y. 435. Because jurisdiction over the person may be conferred by consent, but jurisdiction over the subject-matter cannot be so conferred. BISH. MAR. AND DIV., §§ 151-7. WHARTON CON. OF LAWS, 3rd ed., § 230. *Andrews* v. *Andrews supra,* and *Armitage* v. *Att'y General* (discussed later). Therefore it is not seen how if the *res* is divisible and attending each party, as MR. JUSTICE WHITE contends, the non-domiciled party could by his appearance confer jurisdiction over the *res* affecting him. *Armitage* v. *Att'y Gen. supra.* The conclusion that the *res* is entire and attends each individual seems irresistible. Then if the decree be regarded as *in rem,* so far as it affects the *status* and dependent rights, the domicil of one party will confer complete jurisdiction. This would seem to be the basis upon which must rest the decisions of the State courts which uphold the validity of foreign divorces. See cases cited in the opinion. [Some courts, however, seem to regard the *res* as the *status* of the domiciled party only or as the *status* of the parties in that State, though this view conflicts with the general doctrine that a person's *status* in such matters is determined by his domiciliary *status.*]

The theory of the entirety of the *status* finds abundant support in cases like *Cheever* v. *Wilson,* 9 Wall. 108, and *Jones* v. *Jones,* 108 N. Y. 415, where divorces granted in the domicil of only one of the parties, the other appearing in the proceeding, were regarded as entitled to extraterritorial force.

How does this case differ from *Atherton* v. *Atherton,* 181 U. S. 155? Only in this. In the latter case the husband had remained in the matrimonial domicil while in the present case he had acquired a new one. The rule that will permit the court of the wife's domicil in proceedings instituted by her to inquire whether she was justified in leaving the husband who has secured a divorce from her in his domicil, which was not the matrimonial domicil, but excludes such inquiry when his divorce was granted in his domicil, which was also the matrimonial domicil, is based upon a distinction too subtle for our understanding. The distinction cannot be that between proceedings *in rem* and *in personam.* If the court to which the husband resorted cannot conclusively determine in the former case that the wife left without justification, and so is constructively present, why is such determination conclusive in the latter? Why is one decree entitled to the sanction of the full faith and credit clause which is denied to the other? We say with MR. JUSTICE HOLMES, "I can see no ground for giving a less effect to the decree when the husband has changed his domicil after the separation has taken place. * * * I have tried in vain to discover anything tending to show a distinction between that case (*Atherton* v. *Atherton*) and this."

What is the effect of *Haddock* v. *Haddock?* This question can be answered by examining the conditions obtaining before this decision was rendered, for in no case is a decree entitled to full faith and credit now that was not so entitled before. With the exception of cases where both parties are either actually or constructively within or the non-domiciled party submits himself to the jurisdiction of the court, the decree has only such effect in the other States as their ideas of comity and private international law impel them to give it. The practical result of the decision is largely to withdraw from divorce proceedings the sanction of the full faith and credit clause,

for almost without exception because of comity and independently of this constitutional provision the State courts have given at least partial, and many have given full faith and credit to decrees granted under the conditions named.

It follows that a person who has secured a divorce in the place of his domicil by constructive service upon the non-resident defendant who does not appear, and after his divorce remarries in the State of his domicil is the legal husband there of his second wife but is the lawful husband of his first wife in her domicil, so that intercourse with either woman is matrimonial or adulterous depending upon whether it occurs in the one State or the other. And should the first wife marry again in the State of her domicil she would be guilty of bigamy. *People* v. *Baker,* 76 N. Y. 78. Her issue there by her second husband would be illegitimate and the issue of her former husband born to his second wife in the jurisdiction granting the divorce, one would think could not be regarded as his legitimate children in the domicil of the former wife. However, in *Matter of Hall,* 61 App. Div. (N. Y.) 266, it was *said* that if one who had secured a divorce in North Dakota against a non-resident defendant, who had constructive notice only, and married again in North Dakota, her children born there by her second husband would be legitimate in New York, citing *Miller* v. *Miller,* 91 N. Y. 315. But this only increases the absurdity, while withholding the penalty from the innocent children, for it would make them her legitimate children though their father was not her husband. (Of course we recognize that such results are sometimes accomplished by *statutes* passed in the interest of the innocent offspring.) And thus we find if this be the law that the children of the petitioner who has remarried, and had children in the foreign State are legitimate in the State of the defendant's domicil, while if she has remarried and had children in her domicil, these children are bastards, and all as the result of a comity which is supposed to be largely determined by a desire to protect and safeguard the innocent citizen.

And further, as a person can secure a divorce which is unimpeachable only in the matrimonial domicil, or where both are domiciled he may utterly fail, for if he once leaves his matrimonial domicil and acquires a new one it is not conceivable that a return, however *bona fide,* to the matrimonial domicil would enable him to invoke the rule of *Atherton* v. *Atherton.* He would then be obliged to secure the same domicil as the defendant, a thing which the latter could easily prevent, to say nothing of the injustice of requiring him to make the attempt.

These difficulties are real, not imaginary, and they may excuse if not justify a feeling of disappointment and regret that the full faith and credit clause affords no relief.

It might not be out of place to mention in this connection the case of *Armitage* v. *Attorney General,* Times Law Reports, Feby. 22, 1906, recently decided in England, where it has attracted much attention. The president of the divorce division of the High Court of Justice was asked to declare the children of the petitioner legitimate. Mrs. Armitage had been Mrs. Gillig, having been married in London to Mr. Gillig, who lived there but was

domiciled in New York. Differences arose between them and Mrs. Gillig went to South Dakota and furnished a home. After three months' residence she instituted proceedings for a divorce. Mr. Gillig was personally served in London, entered an appearance, pleaded to the jurisdiction and to the merits and filed a cross-bill. In his answer he said he was a citizen of the United States, temporarily residing in England. He introduced no evidence, and Mrs. Gillig secured her divorce by default, returned to England, and seven months later married Mr. Armitage, by whom she had the children whose legitimacy it is desired to establish in this proceeding.

Mr. Gillig also remarried, and having again become unhappy he asked that his marriage be annulled on the ground that the South Dakota divorce was invalid. Mrs. Armitage testified that she had left England not intending to return, and had in good faith became a resident of South Dakota, and that Mr. Gillig had retained his New York domicil. The president said the question was whether he should recognize a divorce obtained in a state where the husband was not domiciled but which was recognized as a valid divorce in the state of his domicil because he had appeared in the proceeding. *Jones* v. *Jones,* 108 N. Y. 415. The court considers such importing of jurisdiction as absolutely ludicrous in English law, and insufficient unless the court had jurisdiction founded on domicil. However, as the court of the domicil of Mr. and Mrs. Gillig would regard the divorce as valid it would be so regarded in England.

The judge said in closing, "I wish to make one general observation. On this side of the Atlantic we have difficulties enough in dealing with questions arising in suits for divorce. But I think I am right in saying that throughout the British Empire there is a general recognition that it is the husband's domicil which decides the tribunal to try the cause. This principle enables the courts of our empire to deal with cases more simply than can the courts of the United States, for it is obvious that there are more difficulties in cases where questions of different jurisdictions arise, when a court has not one simple test of the husband's domicil to guide it. I can only hope that the efforts that are being made by the Commissioners on the Conference for the Uniformity of Legislation throughout the United States and the labors of the various societies having that object in view may successfully bring about a unified law in matters of divorce. Perhaps the publicity of this case will attract their notice."

The certainty so much desired by the learned judge has not been secured by *Haddock* v. *Haddock,* and we remain in a condition which is embarrassing, if not a reproach both at home and abroad.

If this case would have the effect of reducing the number of divorces it would be a result devoutly to be wished for, but it is submitted that it will be no more conducive to that result than was the barbarous treatment accorded to bastards at common law in reducing their number.

The effect upon the State courts whose rule has depended in part at least upon a belief that the decree was entitled to full faith and credit under the Constitution can only be guessed at, but it is not believed that it will change the rules that they have adopted, but it may have influence upon the rule to

be established in States where the questions have not been decided. Of course the courts whose attitude like that of New York has been consistently opposed to yielding recognition to foreign divorces will follow their previous decisions. F. L. S.

LIABILITY OF WATER COMPANIES FOR FIRE LOSSES.—In two recent articles published in this Review, the question of the liability of water companies for fire losses was somewhat exhaustively discussed. The majority of the actions wherein it has been sought to hold water companies liable for fire losses suffered by private property owners, have been brought for breach of contract. In a few cases the theory adopted was that the water company owed a duty to all property owners, by reason of the public character of its service; and the fact that it was under contract with the city to furnish an adequate water supply and pressure for fire protection, did not relieve it from liability in tort for any loss suffered by an inhabitant of the city through insufficient service. The Supreme Courts of Indiana, in *Fitch* v. *Seymour Water Co.*, 139 Ind. 214, Georgia, in *Fowler* v. *Athens City Water Works Co.*, 83 Ga. 219, and Mississippi, in *Wilkinson* v. *Light, Heat and Water Co.*, 78 Miss. 389, have repudiated this doctrine of liability in tort, though the Supreme Court of North Carolina, a most able and progressive court, has affirmed it, in *Fisher* v. *Greensboro Water Supply Co.*, 128 N. C. 375.

In a somewhat curious way, which it is not material to discuss here, the question of the validity of the judgment in the *Fisher case* got into the federal courts, and the United States Circuit Court, in *Guardian Trust & Deposit Co.* v. *Fisher*, 115 Fed. 184, made an independent examination of the grounds for the North Carolina judgment, holding that an action in tort would lie. This case was carried to the Supreme Court of the United States, and that tribunal has sustained the Circuit Court. *Guardian Trust & Deposit Co.* v. *Fisher*, 26 Sup. Ct. Rep. 186.

MR. JUSTICE BREWER, rendering the opinion of the court, said: "We are met with the contention that, independently of contract, there is no duty on the part of the water company to furnish an adequate supply of water; that the city owes no such duty to the citizen, and that contracting with a company to supply water imposes upon the company no higher duty than the city itself owed, and confers upon the citizen no greater right against the company than it had against the city; that the matter is solely one of contract between the city and the company, for any breach of which the only right of action is one *ex contractu* on the part of the city. It is true that a company, contracting with a city to construct water works and supply water may fail to commence performance. Its contractual obligations are then with the city only, which may recover damages, but merely for breach of contract. There would be no tort, no negligence, in the total failure of the company. It may also be true that no citizen is a party to such a contract, and has no contractual or other right to recover for the failure of the company to act; but, if the company proceeds under its contract, constructs and operates its plant, it enters upon a public calling. It occupies the streets of the city, acquires rights and privileges peculiar to itself. It invites the cit-